IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs December 17, 2008

COREY ADAMS v. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for Davidson County
No. 2001-C-1673 Cheryl Blackburn, Judge

No. M2008-00112-CCA-R3-PC - Filed February 24, 2009

The petitioner, Corey Adams, appeals the denial of his petition for post-conviction relief from his three convictions for facilitation of especially aggravated kidnapping. He argues that he received ineffective assistance of counsel, the State committed prosecutorial misconduct by its use of false testimony, and he was denied his right to trial by jury by the trial court's application of enhancement factors to his sentence. Following our review, we affirm the judgment of the post-conviction court denying the petition.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

ALAN E. GLENN, J., delivered the opinion of the court, in which JERRY L. SMITH and D. KELLY THOMAS, JR., JJ., joined.

Paula Ogle Blair, Nashville, Tennessee, for the appellant, Corey Adams.

Robert E. Cooper, Jr., Attorney General and Reporter; David H. Findley, Assistant Attorney General; Victor S. (Torry) Johnson, III, District Attorney General; and Bret T. Gunn, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

The factual background of this case is derived from our opinion on direct appeal:

> On May 29, 2001, Appellant Christopher L. Williams telephoned Willie Robertson and asked to see a recording studio Robertson intended to rent. The studio was located in the basement of a house owned by Rick Harbin, which house was located on 108 Keaton Avenue in Nashville. Harbin lived above the studio. Robertson agreed to meet Appellant Williams and telephoned Harbin to ask him to

unlock the studio. At approximately 8:00 p.m., Robertson and his four-year-old son, Willie Moss, drove to meet Appellant Williams at a convenience store. When Appellant Williams arrived, he was accompanied by [the petitioner] and Ortega Wiltz. The appellants followed Robertson to the studio. At trial, Robertson testified that he had known Appellant[] Williams and [the petitioner] for approximately ten years and that as juveniles they had been in Woodland Hills Youth Development Center at the same time. However, Robertson testified that he had never before seen Appellant Wiltz.

When they arrived at the studio, Robertson left his son sleeping in the backseat of his car which was parked outside the door to the studio. Harbin met the men downstairs and unlocked the door. He and Robertson then showed the appellants around the studio. However, within minutes, Appellant Williams pointed a gun in Robertson's face and said, "I know you got some money. I need some money." Robertson told Appellant Williams that he had invested all his money in the studio and had only three dollars. Appellant Williams then ordered Robertson to get on the floor and placed his gun in Robertson's mouth. When Robertson informed Appellant Williams that he might be able to "get them some [money]," Appellant Williams replied, "[M]y boys think you're playing." Appellant[] Williams and [the petitioner] then blindfolded Robertson and hogtied him with a chain. According to Robertson and Harbin, all three appellants were armed with guns.

Meanwhile, Appellant Wiltz struck Harbin in the head with a pistol, knocking him to the ground. Appellants Williams and Wiltz then dragged Harbin into an adjoining room and ordered him to "lay down and be quiet." Thereafter, Appellant Williams returned to the other room, while Appellant Wiltz bound Harbin, placed a rope around his neck, and struck him in the head and legs with an axe handle. Once Robertson and Harbin were restrained, Appellant Wiltz picked up a handsaw and "slashed" their throats. Although the saw cut the victims' throats and caused bleeding, the cuts were not "major." Appellant Wiltz also attempted to smother Harbin with a plastic bag, "gagged" him, and took his cellular telephone, keys, and money.

While Appellant Wiltz "work[ed] with" Harbin, Appellant[] Williams and [the petitioner] forced Robertson to telephone people he knew to ask for money. Although Robertson's restraints had been loosened to permit him to use the telephone, he remained blindfolded, and his hands were bound with a chain. After making several calls, Robertson informed Appellant Williams that his cousin, Eric "Smurf" Brown, would give him some money, but he would have to drive to south Nashville. Appellant Williams took Robertson out of the studio and placed him in the backseat of his vehicle. Appellant[] Williams and [the petitioner] then got into the vehicle and drove toward south Nashville. Appellant Wiltz followed in Robertson's vehicle with the child asleep in the backseat.

The appellants left Harbin lying bound and gagged on the studio floor. Harbin testified at trial that he felt his body "getting cold because [he] had . . . lost a lot of blood." Eventually, Harbin was able to remove the gag from his mouth and breathe easier. After approximately forty-five minutes, he managed to escape from his restraints and make his way to the house of a neighbor who was sitting on the porch. The neighbor looked at Harbin, but refused to help him, saying, "I don't want no problem." Harbin then "drug [himself] across the street" to another neighbor's house. As soon as the neighbor saw Harbin, she telephoned the police and paramedics. Harbin was taken to the hospital where he was treated and released.

During the drive to south Nashville, Appellant Wiltz telephoned Appellant Williams and told him to "hurry up and do something" because Robertson's vehicle was nearly out of gas. Appellant Williams drove to University Court where Brown lived. However, they did not go to Brown's apartment because Robertson was unable to walk to Brown's apartment and they did not believe that Brown would give them any money.

Thereafter, Appellant Wiltz parked Robertson's vehicle in an alley, threw the keys, and ran away, leaving the child in the backseat. Appellant Williams drove to the alley and put the child into the backseat of his car. He then put Robertson into the driver's seat of Robertson's vehicle and told him that he had thirty minutes to get some money or they would kill his son. After Appellant Williams drove away, Robertson "[w]iggled out" of the blindfold and climbed out of the car window to avoid disturbing any fingerprints that may have been on the door. He then ran to the "projects" and flagged down a patrol vehicle.

The officer drove Robertson back to his vehicle and alerted dispatch of the kidnapping. Robertson telephoned Brown to come to the scene. While Brown was at the scene, Appellant Williams, who had taken Robertson's cellular telephone, telephoned Brown's cellular telephone and asked to speak with Robertson. Appellant Williams asked Robertson if he had the money. Robertson replied that he had only $6,000. Appellant Williams told Robertson that six thousand dollars was not enough and to call back when he had more money. According to Robertson, Appellant Williams wanted $50,000.

Shortly thereafter, Robertson was taken to the Criminal Justice Center. At the Criminal Justice Center, Appellant Williams again telephoned Robertson and inquired about the money. Robertson informed Appellant Williams that he had only $8,300. Appellant Williams replied, "[W]ell, bring that. That's cool." Robertson and Appellant Williams agreed to meet in north Nashville. Robertson relayed the information to police, and officers were dispatched to the area. Robertson was subsequently informed that the kidnappers had been apprehended, and his son was brought to the Criminal Justice Center. While at the Criminal Justice Center, officers

asked Robertson to view a photographic lineup that included a photograph of [the petitioner]. At that time, Robertson was unable to identify [the petitioner]; however, he positively identified [the petitioner] at the preliminary hearing. Harbin viewed the lineup while at the hospital and immediately identified [the petitioner] as one of the kidnappers.

At trial, Metro Police Officer Jeffrey Tharpe testified that on May 29, 2001, he was on patrol at University Court when Robertson approached his patrol car. According to Officer Tharpe, Robertson was "very upset . . . [and] shouting my kid has been kidnapped." Robertson informed Officer Tharpe that the kidnappers had demanded money and that he knew one of the kidnappers. Officer Tharpe transported Robertson to his vehicle and alerted other officers of the kidnapping, providing a description of the suspect's vehicle. Officer Tharpe observed a chain in the front seat of Robertson's vehicle.

Thereafter, Sergeant Duane C. Williamson arrived at the scene. When the cellular telephone Robertson had in his possession began to ring, Sergeant Williamson told Robertson that he wanted to listen to the person on the telephone. As Sergeant Williamson listened, he overheard a man tell Robertson, "I'm not playing. I'm going to shoot him in the stomach." Robertson informed Sergeant Williamson that the person on the telephone was Appellant Williams. Sergeant Williamson advised Robertson to tell Appellant Williams that he was getting the money together and would meet him in a certain area in north Nashville. Sergeant Williamson then "flooded" the area with marked and unmarked police cars looking for the suspect's vehicle.

After being advised of the alleged kidnapping, Sergeant Danny Collins drove past a vehicle matching the description of the suspect's vehicle. In an attempt to obtain the license plate number, Sergeant Collins followed the vehicle. When the suspect's vehicle suddenly stopped, Sergeant Collins parked approximately three car lengths behind the vehicle. He observed Appellant Williams step out of the vehicle with what appeared to be a semi-automatic pistol in his right hand. Sergeant Collins alerted the other officers in the area that Appellant Williams was armed and the other officers "moved in."

Upon seeing the police cars, Appellant Williams jumped into his vehicle and attempted to flee. As Officer Gregory Blair drove by Appellant Williams' vehicle, he directed a spotlight into the vehicle and observed "two male blacks and a little boy sitting on the passenger's lap." Appellant Williams drove around two patrol cars and attempted a sharp right turn, before crashing into a low brick wall. Appellant Williams then jumped from the vehicle and ran. He was apprehended attempting to climb a nearby fence.

After the wreck, [the petitioner] stepped from the vehicle holding the child with his left hand and a black gun in his right hand. Immediately, [the petitioner] released the child and ran into the alley. The child, who was left standing in the street "totally confused and disoriented," was returned to his father at the Criminal Justice Center. [The petitioner] was subsequently apprehended by the K-9 Squad. Upon being taken into custody, [the petitioner] told the arresting officer, "[M]an, I know I'm in some shit, but I was just caught in the crossfire. I knew about the kidnapping, but I didn't do it."

At the scene of the wreck, officers discovered a nine-millimeter pistol between the seats and a .45 caliber semi-automatic pistol and a loaded magazine on the ground outside the passenger-side door. At the recording studio, officers collected a rope, chain, and an antenna that appeared to have been twisted together and used to tie up one of the victims. Officers also processed Appellant Williams' and Robertson's vehicles for latent prints, but were unable to match any of the fingerprints to the appellants. However, DNA of a blood sample collected from the backseat of Appellant Williams' vehicle matched that of a sample taken from Robertson.

On the evening of May 30, 2001, Sergeant Williamson received an anonymous tip from Crime Stoppers "that [the] third person involved was fixing to get on a bus to Chicago, and gave [Sergeant Williamson] the height, weight, and clothing description." Sergeant Williamson and other officers proceeded to the bus station and observed Appellant Wiltz at the ticket counter. According to Sergeant Williamson, Appellant Wiltz matched the description and "looked . . . like he was trying to disappear." Sergeant Williamson approached Appellant Wiltz and identified himself. Appellant Wiltz agreed to talk with officers and went voluntarily to the Criminal Justice Center. At the Criminal Justice Center, Appellant Wiltz agreed to be photographed and have his photograph placed in a lineup. Robertson and Harbin were then asked to view the photographic lineup. Viewing the lineup separately, both Robertson and Harbin positively identified Appellant Wiltz.

At trial, Appellant Williams testified that approximately one month prior to the instant offenses he gave Robertson 252 grams of cocaine to sell. He instructed Robertson to pay him $8,300 after selling the cocaine. According to Appellant Williams, selling that amount of cocaine usually takes seven to ten days. When Appellant Williams had not received the money within that time period, he contacted Robertson. Robertson informed Appellant Williams that he had been arrested with 140 grams of the cocaine and had to hire a lawyer and make bond.

Appellant Williams testified that on the night of the alleged events, he contacted Robertson and asked for the money. Robertson responded that he did not have it. Later that evening, Appellant Williams met Robertson, and they went to the

recording studio alone. Once inside the studio, Appellant Williams again asked for the money, but Robertson responded, "I told you I would get your money when I get it." Appellant Williams then struck Robertson, and a fight ensued. Eventually, Appellant Williams pointed his gun at Robertson and told him to give him the studio equipment. Williams testified that when Robertson stated that he did not have the equipment, he considered shooting Robertson. However, because they were friends, he decided against it.

Thereafter, Robertson told Appellant Williams that he could get the money, but Appellant Williams did not believe him and attempted to leave. Robertson said, "[I]f you think I'm playing, here, hold [my son] and I'm going to go get the money." Robertson placed his son in the backseat of Appellant Williams' vehicle, saying that he did not want to take his son to University Court where he was going to get the money from his cousin. He then told Appellant Williams to meet him in north Nashville.

Appellant Williams testified that while waiting for Robertson to get the money, he picked up [the petitioner] and drove to "Dodge City . . . to get [the four ounces of cocaine] he had for [the petitioner]." Appellant Williams testified that the child slept as they drove around town. Eventually, Appellant Williams attempted to telephone Robertson, but Robertson did not answer the telephone. Thereafter, Appellant Williams observed a vehicle following them. When he pulled to the side of the road, the vehicle stopped behind him.

Appellant Williams testified that he stepped out of the vehicle with his gun and told [the petitioner] to hold the child down on the backseat in case there was a "shoot out." When no one got out of the other vehicle, he got back into the vehicle. Suddenly, police vehicles "were everywhere." Appellant Williams drove around the police vehicles, but crashed into a stone wall. Because he had drugs and guns in the car, he attempted to flee, dropping his pistol in the vehicle. Appellant Williams related that prior to the preliminary hearing he had never seen Appellant Wiltz.

[The petitioner] testified that prior to his arrest he had never met Robertson, Harbin, or Appellant Wiltz. He related that at 11:30 p.m. on May 29, 2001, Appellant Williams picked him up, and they went to Dodge City to get some cocaine. According to [the petitioner], the son of one of Appellant Williams' friends was sleeping in the backseat of the vehicle. After getting the cocaine, [the petitioner] asked Appellant Williams to take him home, but Appellant Williams told him that he was waiting for a call from Robertson. As they drove around, a white vehicle began to follow them. Appellant Williams stopped, got out of the car with a gun, and told [the petitioner] to keep the child down on the seat. Within seconds, police vehicles arrived, and Appellant Williams jumped into the vehicle. After Appellant Williams wrecked the vehicle, [the petitioner] checked to see if the child was okay

and then ran, dropping his pistol on the ground. He was subsequently apprehended by the K-9 Squad.

Martha Jordan, the records clerk at Woodland Hills Youth Development Center, testified on behalf of [the petitioner]. She related that there were no records that [the petitioner] had ever been confined at the facility.

Appellant Wiltz testified that prior to the instant charges, he had never seen Robertson, Robertson's son, or Harbin and had never been to the recording studio at 108 Keaton Avenue. He further claimed that prior to the preliminary hearing, he had never seen Appellant[] Williams or [the petitioner]. Appellant Wiltz testified that in the days prior to the alleged offenses, he had traveled by bus from Los Angeles to Las Vegas and Dallas, before arriving in Nashville. When he arrived in Nashville, he rented a hotel room where he "hung out" until deciding to travel to Chicago. On the evening of May 30, 2001, he was at the Greyhound Bus Station when police officers asked to speak with him. The officers then asked him to go to the police station, advising him that he fit the description of an alleged kidnapper. Appellant Wiltz testified that he cooperated with police because he "didn't do anything." He denied any involvement in the instant kidnappings. On cross-examination, Appellant Wiltz conceded that he had prior felony convictions of theft and robbery and that he was a drug addict.

Based upon the foregoing evidence, the jury convicted . . . [the petitioner] of four counts of facilitation of especially aggravated kidnapping (Counts 1, 3, 6 and 7) and two counts of facilitation of aggravated kidnapping (Counts 2 and 5) and acquitted [the petitioner] on Count 4. The trial court merged Count 2 with Count 1, and Counts 5 and 7 with Count 6. . . .

Following a hearing, . . . [the petitioner] was sentenced to a total effective sentence of thirty-six years incarceration[.]

State v. Christopher L. Williams, Corey A. Adams & Ortega Wiltz, No. M2003-00517-CCA-R3-CD, 2005 WL 639123, at *1- 6 (Tenn. Crim. App. Mar. 16, 2005), perm. to appeal denied (Tenn. Oct. 10, 2005).[1]

The petitioner filed a timely *pro se* petition for post-conviction relief, and, after the appointment of counsel, an amended petition was filed. The post-conviction court conducted an evidentiary hearing on June 27, 2007. At the hearing, the petitioner testified that counsel was

[1] We note that our supreme court designated this court's opinion as "not for citation." We cite it for background information only. See Tenn. Sup. Ct. R. 4(E)(2).

ineffective because he failed to call Mack Stone and Mandricus Robinson[2] as witnesses at trial. The petitioner said that Stone was a "friend that [he] knew from on the streets," who was going to testify that he saw a maroon vehicle pick the petitioner up a certain time that was not the time the alleged events occurred. He recalled that Stone was subpoenaed for trial and appeared, but counsel "felt that he shouldn't call him or something."

The petitioner testified that Mandricus Robinson, brother of one of the victims, wrote him a letter sometime before trial but after the preliminary hearing "during the time that Robinson had got[ten] locked up." The petitioner recalled that he gave the original letter to his first attorney, and she made a copy for him "on the back of [his] discovery." In the letter, Robinson asked the petitioner to call him and told him he would testify on the petitioner's behalf. According to the petitioner, Robinson was going to testify that he knew from his brother, victim Robertson, that the petitioner was never at the house where the kidnapping occurred and did not "know about what happened at the house at Ke[a]ton." The petitioner said he conveyed this information to counsel and showed him the copy of the letter.

The petitioner testified that counsel was also ineffective for failing to object or properly cross-examine Officer Reese regarding his testimony that he saw the petitioner "walking to the left and holding a child, . . . in the way of saying that I was holding the child hostage or . . . was going to shoot the child . . . if the police did anything to me." The petitioner explained that Officer Reese's testimony conflicted with Sergeant Danny Collins' testimony that he saw the petitioner "pop[] out [of] the car and run[] the other direction." The petitioner also alleged that it was prosecutorial misconduct for the State to present such conflicting testimony.

The petitioner stated that he felt counsel was unprepared because counsel did not discover until the day of trial that the car codefendant Williams crashed into the brick wall belonged to Williams' girlfriend, and not victim Robertson as previously thought. The petitioner acknowledged that the issue got straightened out before trial but said that counsel "didn't have enough time to make up another defense." The petitioner said that he did not want to testify but felt that he had to because counsel was unprepared. However, he admitted that counsel met with him three or four times and provided him with discovery. The petitioner testified that counsel should have objected to the trial court's application of some of the enhancement factors at sentencing, contending that certain factors had to be found by the jury.

On cross-examination, the petitioner admitted that neither Stone nor Robinson was going to testify at the evidentiary hearing. He said that Stone was in federal custody and unable to be subpoenaed, and Robinson had supposedly been subpoenaed but was not present at the hearing. The petitioner also admitted that there was nothing in the letter from Robinson to indicate that it was in fact from him, and the only mention of someone involved in the case was of "Ricc getting in trouble

[2]To prevent confusion, we find it pertinent to note that it is not clear whether Mandricus' last name is actually "Robertson" like his brother, or whether "Robinson" is correct. In any event, we utilize "Robinson" as was done throughout the evidentiary hearing.

with the law about this tree cutting business." The petitioner said "Ricc" referred to the victim, Rick Harbin. Questioned by the court concerning his decision to testify at trial, the petitioner admitted that he had discussed whether to testify with counsel but again said he would not have testified had counsel been prepared.

Counsel testified that he was appointed to the petitioner's case approximately two to three months before trial because the petitioner's previous attorney had a conflict and had to be released from the case. At the time of his appointment, counsel had practiced law for three years with most of his practice in criminal work, but this was his first jury trial. Nevertheless, counsel said he felt ready to represent the petitioner because he had the benefit of the investigation done by previous counsel and also conducted his own investigation. Counsel stated that he interviewed every witness he could locate, called the police officers involved, and listened to the preliminary hearing tapes. Counsel said he was unable to locate victim Harbin to interview him before trial because Harbin was evidently incarcerated in Georgia. Counsel recalled that Harbin was "furloughed" so he could testify at the petitioner's trial; therefore, counsel was able to cross-examine him.

Counsel testified that he met with the petitioner "multiple times" to discuss the case and prepare the petitioner in case he chose to testify. As part of that preparation, counsel asked the petitioner how he would counter the police officer's insinuation that the petitioner "was using the child as some sort of human shield" when he exited the car, to which the petitioner responded he was holding the child to protect him during the high-speed chase. With regard to counsel's cross-examinations of Sergeant Collins and Officer Reese, counsel said he cross-examined them both but "didn't want to emphasize anymore to the jury that [the petitioner] got out of a car with a child in one hand and a gun in the other."

Counsel testified that he talked to Mack Stone before trial and Stone "kind of remembered the car and remembered [the petitioner] getting picked up . . . which would have helped [their] theory" even though "[h]e was kind of vague." However, counsel interviewed Stone again, right before his time to testify, and Stone recalled, for the first time, that he had seen co-defendant Williams, the petitioner, and "also a light-skinned black male with cornrows" in the car. Counsel explained that the later description matched that of codefendant Wiltz, whom the petitioner and Williams both denied knowing. Counsel said he relayed that information to the petitioner, and the petitioner agreed that they should not call Stone to testify.

With regard to Mandricus Robinson, counsel stated that he did not recall anything about him, nor did he recall having seen the letter. Counsel said he had since read the letter and did not believe there was "anything in there that [he] would want to get out." Counsel elaborated that the author of the letter indicated that the author was trying to find victim Harbin in order to threaten him. Counsel did not recall the petitioner asking him to do anything particular at the sentencing hearing but said he did raise the sentencing issue on appeal. Counsel elaborated that "Blakely came down while his appeal was pending," so counsel argued it to the appellate court. However, the appellate court considered Blakely but determined that the failure to submit the enhancement factors to the jury was

harmless error because "what was [in his] record and by his own testimony and his convictions was enough to enhance his sentence."

After the hearing, the post-conviction entered a detailed written order denying the petitioner's requested relief. With regard to the petitioner's complaint that counsel did not call two witnesses, the post-conviction court accredited counsel's testimony and also determined that the petitioner failed to show prejudice in that he did not present the witnesses at the evidentiary hearing. The court found that counsel's decisions regarding the cross-examinations of Officer Reese and Sergeant Collins were trial strategy and that the petitioner did not demonstrate that counsel performed deficiently or any resulting prejudice in that regard. The post-conviction court accredited counsel's testimony that the petitioner did not ask that anything specific be addressed at the sentencing hearing. The court noted that counsel appealed the petitioner's sentence and argued Blakely to the appellate court, but the appellate court upheld the petitioner's sentence. The court found that the petitioner "failed to show that the number of meetings he had with counsel was so deficient as to constitute ineffective assistance of counsel." The court further found that counsel's testimony was credible with regard to the petitioner's decision to testify and that the petitioner failed to demonstrate how he was prejudiced by testifying on his own behalf. Thereafter, the petitioner filed an untimely notice of appeal, which this court waived and granted permission to proceed.

ANALYSIS

Standard of Review

The post-conviction petitioner bears the burden of proving his allegations by clear and convincing evidence. See Tenn. Code Ann. § 40-30-110(f) (2006). When an evidentiary hearing is held in the post-conviction setting, the findings of fact made by the court are conclusive on appeal unless the evidence preponderates against them. See Tidwell v. State, 922 S.W.2d 497, 500 (Tenn. 1996). Where appellate review involves purely factual issues, the appellate court should not reweigh or reevaluate the evidence. See Henley v. State, 960 S.W.2d 572, 578 (Tenn. 1997). However, review of a trial court's application of the law to the facts of the case is *de novo*, with no presumption of correctness. See Ruff v. State, 978 S.W.2d 95, 96 (Tenn. 1998). The issues of deficient performance of counsel and possible prejudice to the defense are mixed questions of law and fact and, thus, subject to *de novo* review by the appellate court. See State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999).

I. Ineffective Assistance of Counsel

The petitioner first argues that he received ineffective assistance of counsel. He asserts that counsel was ineffective in that he failed to call two witnesses to testify at trial, failed to thoroughly investigate the facts of the case, and did not properly cross-examine Officer Reese. He also asserts that counsel failed to object or argue against the trial court's findings of enhancement factors at sentencing; however, the petitioner did not provide any argument in support of this assertion in his brief.

The right to effective assistance of counsel is safeguarded by the Constitutions of both the United States and the State of Tennessee. See U.S. Const. amend. VI; Tenn. Const. art. I, § 9. In order to determine the competence of counsel, Tennessee courts have applied standards developed in federal case law. See State v. Taylor, 968 S.W.2d 900, 905 (Tenn. Crim. App. 1997) (noting that the same standard for determining ineffective assistance of counsel that is applied in federal cases also applies in Tennessee). The United States Supreme Court articulated the standard in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984), which is widely accepted as the appropriate standard for all claims of a convicted petitioner that counsel's assistance was defective. The standard is firmly grounded in the belief that counsel plays a role that is "critical to the ability of the adversarial system to produce just results." Id. at 685, 104 S. Ct. at 2063. The Strickland standard is a two-prong test:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687, 104 S. Ct. at 2064. The Strickland Court further explained the meaning of "deficient performance" in the first prong of the test in the following way:

> In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. . . . No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.

Id. at 688-89, 104 S. Ct. at 2065. The petitioner must establish "that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms." House v. State, 44 S.W.3d 508, 515 (Tenn. 2001) (citing Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996)).

As for the prejudice prong of the test, the Strickland Court stated: "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694, 104 S. Ct. at 2068; see also Overton v. State, 874 S.W.2d 6, 11 (Tenn. 1994) (concluding that petitioner failed to establish that "there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different"). To satisfy the prejudice requirement of Strickland when alleging that counsel was ineffective for failing to offer testimony from a favorable witness, the post-conviction petitioner must "(1) produce the witness at his post-conviction hearing; (2) show that through reasonable investigation, trial counsel could have located the witness; and (3) elicit both favorable and material

testimony from the witness." Denton v. State, 945 S.W.2d 793, 802-03 (Tenn. Crim. App. 1996) (citing Black v. State, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990)).

The reviewing court must indulge a strong presumption that the conduct of counsel falls within the range of reasonable professional assistance, see Strickland, 466 U.S. at 690, 104 S. Ct. at 2066, and may not second-guess the tactical and strategic choices made by trial counsel unless those choices were uninformed because of inadequate preparation. See Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982). The fact that a strategy or tactic failed or hurt the defense does not alone support the claim of ineffective assistance of counsel. See Thompson v. State, 958 S.W.2d 156, 165 (Tenn. Crim. App. 1997). Finally, a person charged with a criminal offense is not entitled to perfect representation. See Denton, 945 S.W.2d at 796. As explained in Burns, 6 S.W.3d at 462, "[c]onduct that is unreasonable under the facts of one case may be perfectly reasonable under the facts of another."

The petitioner contends that counsel provided ineffective assistance for failing to call Mack Stone and Mandricus Robinson to testify at his trial. He asserts that Stone's testimony would have proven he was not at the location where the kidnappings took place, and Robinson's testimony would have proven he had no knowledge of the incidents. Counsel testified that he interviewed Stone and determined that his testimony would be more harmful than helpful. Counsel testified that he did not recall hearing anything about Robinson or seeing the letter and that having since reviewed the letter, he found it to be of no value. The post-conviction court accredited counsel's testimony and also noted that the petitioner failed to call Stone and Robinson to testify at the evidentiary hearing, leaving the court to speculate as to what their testimonies would have been. See Black, 794 S.W.2d at 757. As such, the petitioner has failed to prove that counsel rendered deficient performance or that any deficiency caused him prejudice.

The petitioner argues that counsel did not thoroughly investigate the facts of the case. He contends that had counsel done so, he would have discovered that the car he and codefendant Williams were in when apprehended belonged to Williams' girlfriend, not victim Robertson. He claims he "had no choice, but to testify" due to counsel's unpreparedness. However, the petitioner admitted at the hearing that this information regarding the ownership of the car was discovered before trial, but he did not allege how not finding out this information sooner had prejudiced his case, other than "he had . . . to testify." In this regard, the post-conviction court found that the petitioner failed to prove how he was prejudiced by testifying on his own behalf. Moreover, counsel testified regarding his investigation that he interviewed every witness he could locate, talked to the police officers involved, and listened to the preliminary hearing tapes. The petitioner has failed to prove that counsel rendered deficient performance or that any deficiency caused him prejudice.

The petitioner argues that counsel failed to thoroughly cross-examine Officer Reese regarding the discrepancies between his and Sergeant Collins' observations. He asserts that Officer Reese's testimony "was damaging to [the petitioner] because it made [the petitioner] look like he was holding the child as a hostage"; therefore, counsel's failure to point out Sergeant Collins' observations to Officer Reese, in the presence of the jury, was detrimental to his case. At the hearing, counsel

testified that he "didn't want to emphasize anymore to the jury that [the petitioner] got out of a car with a child in one hand and a gun in the other" because he saw it as one of the most damaging aspects of the case. The post-conviction court found that "the depth of the cross-examination was a decision made by trial counsel because of strategy." The evidence does not preponderate against this determination.

II. Prosecutorial Misconduct

The petitioner next argues that the State committed prosecutorial misconduct by its use of Officer Reese's testimony because the State "knew or should have known [the testimony] was false." The petitioner notes that Officer Reese testified at trial that after the car crashed, he saw the petitioner get out of the car holding a child in his left hand and a gun in his right hand. When Officer Reese approached, the petitioner threw the weapon down, released the child, and took off running. The petitioner notes that, on the other hand, Sergeant Collins testified that after the car crash, he saw the person in the passenger's side "pop out . . . and [run] the other way" with no mention of a child or weapon. It is the petitioner's view that because Officer Reese's testimony was different, it was false and materially prejudicial to his case.

Upon review, we first note that the petitioner has waived this issue for failing to raise it on direct appeal. See Tenn. Code Ann. § 40-30-106(g); Larry Glenn Cauley v. State, No. M2007-02084-CCA-R3-PC, 2008 WL 2579228, at *6 (Tenn. Crim. App. June 30, 2008); John C. Johnson v. State, No. M2004-02675-CCA-R3-CO, 2006 WL 721300, at *19 (Tenn. Crim. App. Mar. 22, 2006), perm. to appeal denied (Tenn. Aug. 20, 2007). Even if not waived, the petitioner did not offer any proof to establish that Officer Reese's testimony was false. Witnesses sometimes perceive or remember different facts. Just because the two officers' testimonies did not correspond exactly does not render Officer Reese's testimony false. Moreover, the petitioner offered no evidence that the State knowingly proffered false testimony. The petitioner has not met his burden of proving his allegations of fact by clear and convincing evidence. See Tenn. Code Ann. § 40-30-110(f) (2006). He is not entitled to relief on this claim.

III. Sentencing

The petitioner lastly argues that he was denied his right to trial by jury as set out in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004), and Cunningham v. California, 549 U.S. 270, 127 S. Ct. 856 (2007), because the trial court enhanced his sentence based on factors not found by the jury. He specifically challenges the trial court's application of enhancement factor (5), the victim was treated with exceptional cruelty; factor (9), possession of a firearm during commission of the offense; and factor (16), the crime was committed under circumstances under which the potential for bodily injury to the victim was great. Tenn. Code Ann. § 40-35-114(5), (9), (16) (2001). The petitioner challenged the trial court's sentencing decision on direct appeal, and this court discussed Blakely and its ramifications to the petitioner's sentence. The court stated:

> Clearly, the application of enhancement factor (2), when based upon a defendant's prior convictions, does not violate the dictates of Blakely. Moreover, Blakely indicates approval of the use of enhancement factors supported by facts reflected in the jury verdict or "admitted by the defendant." Blakely, 542 U.S. at ----, 124 S. Ct. at 2537; see also Apprendi [v. New Jersey], 530 U.S. [466,] 490, 120 S. Ct. [2348,] 2362-63 [(2000)]. Prior to Blakely, the application of the enhancement factors would have been appropriate in the instant case. However, because the facts underlying the application of enhancement factors (3), (5), (6), and (17) were not reflected in the jury verdict or admitted by the appellants, Blakely precludes their application. See State v. Ambreco Shaw, No. W2003-02822-CCA-R3-CD, 2004 WL 2191044, at *9 (Tenn. Crim. App. at Jackson, Sept. 28, 2004), application for perm. to appeal filed, (Nov. 22, 2004).
>
> Nevertheless, we conclude that the application of enhancement factors (2), (9), (10), and (21) did not violate Blakely. Enhancement factor (2), which was based upon prior convictions, was properly applied to enhance the sentences of Appellant[] Williams and [the petitioner]. . . . At sentencing, [the petitioner] conceded that he had violated prior probationary sentences; thus, the application of enhancement factor (9) to enhance his sentences did not violate Blakely. Furthermore, Appellant[] Williams and [the petitioner] admitted at sentencing that they had juvenile adjudications that would have constituted felonies if committed by an adult, thereby providing the factual basis for the application of enhancement factor (21). We further note that enhancement factor (10), which was applied to enhance Appellant[] Williams' and [the petitioner's] sentences for the offenses involving the child, was reflected in the jury verdicts convicting the appellants of the kidnappings accomplished with a deadly weapon. We conclude that these factors were sufficient to support the sentences imposed by the trial court.

Christopher L. Williams, 2005 WL 639123, at *16.[3]

It is well-established that post-conviction proceedings may not be employed to relitigate issues previously determined on direct appeal. See, e.g., Miller v. State, 54 S.W.3d 743, 747-48 (Tenn. 2001) (stating that issue raised and resolved in the petitioner's direct appeal cannot be revisited in post-conviction proceeding); Searles v. State, 582 S.W.2d 391, 392-93 (Tenn. Crim. App. 1979); Jeremiah Ginn v. State, No. M2007-01270-CCA-R3-PC, 2008 WL 2780593, at *4 (Tenn. Crim. App., July 18, 2008). From the excerpt above, it is evident that the issue concerning the trial court's enhancement of the petitioner's sentence was previously determined and may not be relitigated in a post-conviction proceeding. The petitioner is not entitled to relief on this issue.

[3] We note that the opinion on direct appeal utilizes the enhancement factor numbering in place at the time of sentencing; whereas the petitioner's argument utilizes the numbering in place on the offense date. Regardless, the substance of the factors is the same.

CONCLUSION

Based on the foregoing reasoning and authorities, we affirm the post-conviction court's denial of post-conviction relief.

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ALAN E. GLENN, JUDGE